No. 80-56

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

vs.

UNITED STEELWORKERS OF AMERICA, *et al,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STEELWORKERS OF AMERICA, *et al,*
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lorain, a division of Koehring Company ("Lorain"), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit filed on February 14, 1980. The decision reversed the judgment of the District Court that found the United Steelworkers of America ("International Union") liable for a portion of the damages suffered by the Company during an admittedly unlawful wildcat strike and affirmed the judgment of the lower court dismissing the International Union's Local 8164, as well as individual defendants, from any monetary liability at all.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A., *infra*, pp. A-1—A-9) is reported at _____ F.2d _____ (1980). The unreported pre-trial Order and Memorandum and Final Judgment and accompanying Findings of Fact and Conclusions of Law of Judge Frank W. Wilson of the District Court for the Eastern District of Tennessee are reproduced as Appendix B., *infra*, (pp. A-10—A-29).

JURISDICTION

The decision of the Court below issued on February 14, 1980. On April 4, 1980, the Court denied Lorain's Petition for Rehearing and Suggestion for Rehearing *En Banc* (Appendix C, *infra*, p. A-30). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A. Consistent with effectuating the desirable labor-management goals established by Congressional policies to eliminate industrial strife, what responsibility, if any, does a union have under an express no-strike clause to utilize its efforts and powers to prevent or terminate an admittedly illegal strike when the union has expressly covenanted to affirmatively act to prevent and end such a strike?

B. May a court substitute its judicial policy of declining to impose a best efforts obligation on a union in place of an express contract provision imposing such an obligation, particularly when the interpretation of that provision was not challenged in the court below?

C. Under what circumstances, if any, may individual employees be held financially liable for causing monetary damage to their employer as a result of initiating, participating

and/or prolonging an unlawful strike in violation of a valid, binding, and enforceable no-strike obligation?

D. Is the employer's only remedy for such a violation discipline and discharge of individual employees as the Court below ruled?

STATUTE INVOLVED

The pertinent provisions of Section 301, of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185 ("the Act"), are reproduced and set forth in Appendix D, *infra*, pp. A-31—A-32.

STATEMENT OF THE CASE

In this case a panel of the Court of Appeals, consistent with the Circuit's policy of refusing to sanction a best efforts obligation on a union as a standard for the imposition of damages, notwithstanding an express no-strike provision that contemplates such obligations and resulting damages, set aside an award of damages against the International Union. The decision thus left Lorain with no remedy to recover the damages it was found to have suffered as a result of an admittedly unlawful strike in light of the panel's affirmance of the District Court's decision dismissing Local 8164 and individual defendants from liability (App. A., p. A-9; App. B., pp. A-15—A-16). The remedy Lorain has, according to the Court below, "must be discipline or discharge" against individual employees (App. A, p. A-9). Further, in its haste not to give any appearance of condoning a best efforts doctrine, the panel construed the language of the no-strike provision, the meaning of which was never contested in District Court, in such a manner to leave it without meaning, solely because the literal application of the language "increas[ed] the duty contracted for by the union beyond that imposed by operation of law" (App. A. p. A-2).

A—The Facts

This action for injunctive relief and damages was filed on July 20, 1976, pursuant to Section 301 of the Act, and concerned a strike that had commenced on July 15, 1976 (App. B. p. A-19). The strike had the effect of terminating all of Lorain's Chattanooga, Tennessee plant operations from July 16, through July 20, 1976 (App. B. p. A-20). The action named the International Union, the certified collective bargaining representative for Lorain's some 122 production and maintenance employees; its Local 8164 which was chartered by the International Union subsequent to its certification; and certain individually named represented employees who either initiated, participated in, or prolonged the strike (App. B. p. A-10).

It was conceded that the strike was in violation of the express no-strike provision contained in the collective bargaining agreement ("the Agreement") then existing between Lorain and the International Union. It was further conceded that the cause of the illegal strike concerned unit employee complaints, each of which was admittedly the proper subject of the Agreement's exhaustive and detailed grievance procedure that culminated in final and binding third party arbitration.

In pertinent part the no-strike language provided as follows:

> "There shall be no lockout by the Company *and* the Union will not *cause, sanction, or approve* any employees represented by it to *cause or participate* in a strike . . . during the term of this agreement . . . On the contrary, the Union *will actively discourage* and *endeavor to prevent or terminate* any stoppage . . . *and* participation in such activities during this Agreement (or extension) shall result in discharge of all those employees responsible for such occurrences . . . The Union shall not be liable for monetary damages for unauthorized strikes, work stoppages, etc. or other interruptions of work which are not *authorized, supported, encouraged or ratified by it or its officers, or com-*

> *mitteemen or duly authorized agents of the Union.* Any employee discharged or disciplined under this Article shall have recourse to the grievance procedure, including arbitration." (Emphasis added) (App. B. p. A-19).

The meaning or interpretation of this language was not in issue before the District Court.

In its action for damages, Lorain sought to recover the damages (*i.e.* $67,243.59) it had sustained as a result of the strike from the International Union and its found agents; the officers, and representatives of Local 8164 (App. B. p. A-25) for their failure and refusal to fulfill the above contractual undertakings. They had done nothing to disfavor the strike or to attempt to dissuade employees from engaging in or continuing the strike. Nor did they attempt, through the exertion of any efforts, to keep the strike from happening or to stop it once it began. Such lack of positive action included, *inter alia*: their refusal to lead, urge, advise, admonish, or discipline the strikers or threaten the same either before, during, or after the strike, or themselves report or even attempt to report for work during the entire course of the unlawful, but peaceful, strike. On the contrary, the International Union, through its admitted agent, William H. Crawford, purposefully withheld the services of its employee-agents away from company property for the sole and exclusive purpose of negotiating the grievances that had precipitated the strike. The termination of the strike was conditioned on the resolution of these grievances as well as the recision of Lorain's announced intention to exercise its contractual right to discipline the employees involved.

Alternatively, it was argued that if the International Union or Local 8164 were not liable for all, or only a portion, of the damages incurred due to their failure to fulfill their contractual obligations, then individual liability should be imposed on the named individual defendants acting in their personal, non-union capacities. Someone breached the contract, and if the Unions were not liable, then the individual employees were.

B—The District Court's Rulings

Before trial District Judge Frank W. Wilson sustained a motion dismissing the action against the individual defendants, despite this Court's specific reservation in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) (*see* footnote 7) on the issue of whether individual liability exists for a breach of a no-strike provision (App. B. p. A-10—A-11). In so doing, he adopted the rationale of the Seventh Circuit in *Sinclair Oil Corp.* v. *Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49 (1971) in construing Section 301(b) of the Act.

Following trial, without jury, on June 27, 1977, the Court directed that Lorain's action against Local 8164 be dismissed because it was not a signatory party to the breached agreement. The Court found, however, on the basis of the entire record, and particularly under the uncontested terms of the no-strike provision, that while the International Union did not initiate the strike (App. B. p. A-27):

> "... from and after Sunday, July 18, 1976, the International Union, acting through its International Representative as well as through the officers of the Local Union, breached the no-strike clause of its collective bargaining contract with the Company by the failure and refusal of its agents from and after that date to take any further action whatever to seek, induce, or procure a termination of the illegal work stoppage that had commenced upon the previous Thursday. From and after Sunday both the International Representative and the Local Union officers abandoned all efforts to effect a return to work of the union members, casting the entire burden of procuring a termination of the strike upon the Company. Under the terms of its contract with the Company, the International Union agreed not only to refrain from causing or participating in a work stoppage during the term of the contract, but also agreed to 'actively ... endeavor to ... ter-

> minate any work stoppage . . .' The International Union also agreed not to take action which would constitute a ratification of the strike. While the contract by its terms expressly relieves the International Union of liability for monetary damages for an unauthorized strike, the contract further expressly provides that such limitation on liability for monetary damages does not extend to a work stoppage "...encouraged or ratified by ... duly authorized agents of the Union." The Court concludes that the failure and refusal of the union agents to take any action after Sunday, July 18, in an effort to terminate the admittedly illegal work stoppage constituted a ratification of the strike from and after that date. This conclusion is further reinforced by the failure and refusal of both the Local Union and the International Union since the termination of the strike to seek to either identify or discipline those members who initiated the illegal work stoppage."

Accordingly, the Court found Lorain entitled to recover from the International Union a prorated portion of its damages for the final two working days of the strike, which amount to $29,591.72.[1]

The International Union appealed, and Lorain cross-appealed seeking its entire damages against the International Union or alternatively against the individual defendants or Local 8164.

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[1] The Court disallowed one item of damages in the amount of $15,458.00. In its cross-appeal Lorain sought recovery of this item.

C—The Decision of the Court of Appeals

The panel's decision itself reflects the Sixth Circuit's well known disagreement with and rejection of the Third Circuit's best efforts doctrine enunciated in *Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (1975), *cert. denied* 424 U.S. 935 (1976): "It is not the law in this Circuit that a union is required to take affirmative action to end a strike, absent exceptional circumstances. (citations omitted) The best efforts doctrine of [*Eazor*] has been repeatedly disavowed in this circuit." (citations omitted) (App. A. p. A-4) *See* also *Southern Ohio Coal Co.* v. *U.M.W.*, 551 F.2d 695 (6th Cir. 1977).

While erroneously finding that the District Court relied upon *Eazor* in imposing liability because of the International Union's inaction (*See*. App. A. p. A-5 and App. B. p. A-26, A-28), the panel rejected the lower court's interpretation of the no-strike provision "as increasing the duty contracted for by the union beyond that imposed by operation of law" (App. A. p. A-2). Thus, it concluded that due to its judicial policy of rejecting the imposition of affirmative obligations on unions due to "the peculiar role unions play in labor relations" (App. A. p. A-4) and therefore damages "may not be awarded as a result of a union's performing its normal union functions" (App. A. p. A-4), liability could not be imposed as a result of the union's actions.

With this admittedly prevailing Circuit philosophy, the panel, contrary to the mandates of Rule 52 of the *Federal Rules of Civil Procedure*, undertook the task of construing the theretofore uncontested language of the no-strike provision and concluded that the language imposed "no higher a standard of responsibility than that of law" (*i.e.*, no affirmative action or best efforts obligations) (Ap. A. p. A-5). In so doing, the covenant to "actively discourage and endeavor to prevent or terminate" any such stoppage was rendered meaningless. Thus, the lower court's ratification conclusion, which the panel did not find to be clearly erroneous, was rejected.

In addition, the panel found it was permissible for the agents of the International Union to discuss the grievances that precipitated the strike, as well as forgiveness of the strikers' actions, while the strike was in progress and to condition the termination of the strike on the granting of such relief (App. A. p. A-6). In this same regard, it appears to reject any obligation on the part of a union to impose, or even threaten, internal union-disciplinary sanctions either during or after an unlawful strike.[2]

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[2] Congress clearly intended to authorize internal union discipline for such a purpose. *See* 29 U.S.C. §411(a)(2).

REASONS FOR GRANTING THIS WRIT

1. The Decision Below Expressly Places That Court At Odds With The Decisions of Third Circuit Concerning a Union's Obligations Under An Express No-Strike Provision.

The Court below expressly "disavowed" the best efforts enunciated by the Third Circuit in *Eazor Express, Inc.* v. *Teamsters, supra*. The operative facts in each case are virtually identical: a negotiated express no-strike provision that contained affirmative action undertakings by the unions in the event a breach occurred; a breach occurred over matters subject to the grievance process; failure to initiate and exhaust the grievance process; no positive steps were undertaken by the unions to prevent or immediately terminate the strike, *e.g.*, the removal of officers who were leading the strike or the use of internal union sanctions; damages suffered by the employer; and the insistence on settling the underlying grievances outside of the contractual procedures, including the forgiveness of strikers as a condition of the strike's termination. The conclusion in one case is, however, diametrically at odds with that in the other. In *Eazor*, the union could not "disclaim responsibility for the losses suffered by the employer as the result of the strike unless and until it has exhausted all reasonable means within its power to bring that unlawful action to an end." 520 F.2d at 960. On the other hand, according to the Court below: "It's not the law in this Circuit that a union is required to take affirmative action to end a strike, absent exceptional circumstances" (App. A. p. A-4).

It is respectfully submitted that the resolution of this obvious conflict between the Circuits is of fundamental importance in applying our federal labor laws. It is now well settled that a no-strike obligation, either express or implied, is the *quid pro quo* for an employer's agreement to submit labor disputes to arbitra-

tion. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). "[A]rbitration is the substitute for industrial strife, "*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) and "[t]he primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike" *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54 (1973). Surely if, as the Court below held, it is legally permissible for a union to do essentially nothing from the inception of an admittedly illegal strike until its conclusion over grievances that are admittedly the proper subject of the grievance-arbitration procedure without incurring liability for the losses an employer suffers, the most important incentive for agreeing to the favored method of dispute resolution would be rendered largely illusory. This is particularly so when, as here, the employer was successful in securing contract language that obligates a contracting union to take affirmative action, and the failure to do so constitutes a basis for the imposition of monetary liability as the District Court found.

Further, if a union is not to be held liable for losses contrary to the Third Circuit's rationale, but rather the employer's only recourse is discipline and discharge as the Court below found, the incentive would totally evaporate. This is so, because when, as here, an employer is confronted with a mass walk out of its employees, in order to exercise its remedy it would have to denude itself of its work force, which would be economically self-defeating. Indeed, the damage would only be compounded if, as happened here, the employer had to defend its action in the grievance-arbitration procedure.

2. **The Decision Below Is Inconsistent With Recent Decisions Of This Court And The First Circuit As Well As The Position Taken By The Fifth Circuit.**

In *Carbon Fuel Co.* v. *United Mine Workers*, _____ U.S. _____, 100 S. Ct. 410 (1979), this Court granted certiorari to resolve the apparent conflict among the Circuits created by

United Construction Workers v. *Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955), and *Eazor Express, Inc.* v. *Teamsters, supra.* In *Haislip Baking Co.*, recovery was denied where the contract did not contain an express "no-strike" clause nor for "wild-cat" strikes or "requiring that they [the unions] take any action with regard to them." 223 F.2d at 886-87. On the other hand, the contract in *Eazor Express* did contain an express "no-strike" clause which imposed affirmative action obligations upon the union in the event of a "wild-cat" strike.

In *Carbon Fuel*, this Court refused to impose an affirmative "best-efforts" obligation upon the union in the event of a "wild-cat" strike. Indeed, such an obligation had been negotiated out of the contract that was before the Court. However, the Court did not reject the Eazor Express rationale, where, as here, the contract specifically places an affirmative action obligation upon the union. Nor did this Court reject the imposition of damages where the union refused or failed to fulfill its affirmative contractual undertakings and, contrary to the Court below, those contractual undertakings can increase a union's duty "beyond that imposed by operation of law."[3] Thus, Mr. Justice Brennan specifically wrote:

> "In the 1947 Taft Hartley Act Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free

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[3] The Fourth Circuit's disagreement in *Carbon Fuel* with the Third Circuit appears not to have been so much directed at *Eazor*, but to its subsequent decision in *U.S. Steel* v. *Mine Workers*, 534 F.2d 1063 (1976) which concerned the imposition of a best efforts obligation under an implied no-strike provision. The thrust of the disagreement was that the imposition of such an obligation would be to rewrite the terms of the parties' agreement. Thus, the Fourth Circuit clearly implies that if it had been confronted with an express no-strike obligation containing affirmative action covenants it would have no disagreement with *Eazor*, a result in which the Sixth Circuit would not join as reflected in the instant decision.

> collective bargaining [citations omitted]. And to make crystal clear the intention to leave the parties entirely free of any government compulsion to agree to a proposal, or even reach agreement, Congress added §8(d) defining "to bargain collectively" as "not [to] compel either party to agree to a proposal or require the making of concessions" 29 U.S.C. §158(d) [citations omitted]. *It follows that the parties' agreement primarily determines their relationship* [citations and comment omitted]. *If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.* (Emphasis added) 100 S.Ct. at 414, 415.

Here, unlike *Haislip, Carbon Fuel*, and the other "coal cases," there is a very specific no-strike provision. It is in fact much broader than that involved in *Eazor*, and it details with particularity what the obligations of the International Union are *both* before *and* after an illegal strike begins. It is obvious these parties recognized there could be no guarantee that an illegal strike would not occur during its term. However, as part of its bargain, Lorain was able to secure from the Union specific undertakings which, if not fulfilled by it, its agents, and representatives, would result in financial liability to it.

Contrary to the above-quoted language from *Carbon Fuel*, the Court below deprived Lorain the fruits of its bargain. It substituted its judicial policy of not requiring a union to use its "best efforts" to end a strike in place of the uncontested contract language. The language is clearly "best efforts" language, and the Court below erred in substituting its own policy for that agreed upon by the parties. In so doing, it not only construed the language out of existence, but placed itself at further odds with the Third Circuit's *Eazor* decision, which stated the law of contract construction as follows:

> "Rather than to construe a contract as producing such a result [*i.e.* absolving a union of liability under an express

> no-strike clause for a strike even though it did not authorize it], the courts will favor a construction making the mutual promises binding and giving the contract legal effect. 1A *Corbin on Contracts* 8-9. 3 *Corbin on Contracts* 168-171; 17 Am. Jur. 2d 452". 520 F.2d at 960.

The Court below is obviously of a different opinion.

Furthermore, in refusing to apply the specific contract language and to find that it imposed a higher duty than that imposed by law, it placed itself in conflict with the Fifth Circuit's *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1249 (1975) and most recently the First Circuit's decision in *Latas Libby's, Inc.* v. *United Steelworkers of America*, 609 F.2d 25 (1979). Both cases recognized that where the parties have negotiated an agreement that describes with particularity a union's responsibilities in the event of a strike violative of an express no-strike provision, that language, not judicial philosophy, must control. Indeed, the facts in *Latas Libby's* are so remarkably similar to those extant here, but the results in each are so remarkably dissimilar, that this petition for certiorari should be granted for this reason alone.

3. The Decision Below Raises A Question Of Fundamental, Exceptional, And Reoccurring Importance And One Expressly Left Unresolved By This Court.

As the Court below recognized, not only in this case but in another very recent case,[4] this Court has never decided the question of whether an employer has the right to recover damages from individual members for breaches of an express no-strike provision. Since this Court expressly left this substantial question open in *Atkinson* v. *Sinclair Refining Co., supra*, it has continually reoccurred with conflicting results; *See, e.g., Du-*

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[4] *Complete Auto Transit, Inc.* v. *Reis, et al* 614 F.2d 1110 (1980).

Quoin Packing Co. v. *Amalgamated Meatcutters Local P-156*, 321 F.Supp. 1230 (D.C. Ill, 1971); *Maita* v. *Killeen*, 465 F.Supp. 471 (E.D. Pa. 1979); *Alloy Cast Steel Co.* v. *United Steelworkers*, 429 F.Supp. 445 (N.D. Ohio 1977); *Bacino* v. *American Federation of Musicians*, 407 F.Supp. 548 (N.D. Ill. 1976).

If the Court below is correct that the only remedy an employer has is discipline and discharge of its employees,[5] it would, of course, mean an employer is not entitled to compensation for damages suffered as a result of the unlawful conduct of its employees. In fact, even under the *Eazor* standard the Third Circuit permits a union a reasonable opportunity to fulfill its contractual undertakings before liability can accrue. *See* 520 F.2d at 965. Thus, without liability residing with individual employees, the state of the law, even if the *Eazor* rationale were to be accepted, would be to leave an employer exposed to damages without any recourse to recover its losses for at least a portion of an unlawful strike. Consequently, the purposes served by a no-strike pledge could be violated with impunity. It is respectfully submitted that the plain purposes of the Act contemplate no such results. On the contrary, wildcats are the very antithesis of a collective bargaining relationship that is governed by negotiated terms and conditions of employment, including the obligation not to strike in return for an employer agreeing to submit its decision-making responsibilities to arbitration.

Section 301(b) of the Act was intended to prevent a reoccurrence of the famous Danbury Hatters' case, *Loewe* v. *Lawlor*, 208 U.S. 274 (1908). Thus, unions were made entities for pur-

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[5] Although the court below accepted the Seventh Circuit's conclusion in *Sinclair Oil Corp., supra*, concerning individual liability, it appears to reject the notion stated there that a union "has the right to discipline its disobedient members" for engaging in a wildcat, 452 F.2d at 54. It certainly concludes, contrary to *Eazor*, that the failure to invoke internal union discipline, particularly after the strike has ended, is evidence of ratification as the District Court found.

poses of suit, and, unlike the rule at common law, the members of the unincorporated association were not made liable, jointly or severally, on the judgment against the union.

For years, however, individual employees have been permitted to sue their employer under Section 301. *See, e.g., Smith* v. *Evening News Association*, 371 U.S. 195 (1962). More recently, this Court has stated that the Act "contemplates suits by *and against* individual employees as well as between unions and employers; . . ." *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976) (Emphasis added).

It is clear that the no-strike clause in this case was breached by a group of employees who enjoyed the benefits of the contract. It is likewise clear that Lorain has been damaged, and substantially so, by that breach. If the union is not responsible for those damages, then the individual employees must be found liable. Otherwise, Lorain would be the victim of a wrong, yet without a remedy.

Certainly, if the union is liable, then Section 301(b) would protect the employees from execution upon their assets. Likewise, if they act as a union, the suit must be against the entity and not against the individual employees. Yet, here the lower court concludes that the employees breached the contract but refuses to hold their union liable. To hold that the employees themselves are not liable is to misread the intent of Section 301(b), this Court's decision in *Hines* v. *Anchor Motor Freight, Inc., supra*, and to announce a rule of law that one party to a contract may sue, but not be sued, for its breach.

Employers are, of course, required to bargain with the designated collective bargaining representative of their employees, and to embody any agreement reached in writing. 29 U.S.C. §185(a). Here, the lower court held that Lorain may not have the benefit of the contract that it so reached. It is a patently unfair result.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 77-1678-9
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United Steelworkers of America, et al.,
Appellant-Cross Appellee,
v.
Lorain, A Division of Koehring Company,
Appellee-Cross Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee.

Decided and Filed February 14, 1980.

Before: Weick, Keith, and Kennedy, Circuit Judges.

Kennedy, Circuit Judge. Appellee Lorain filed suit July 20, 1976, against the United Steelworkers of America (International Union), its staff representative Crawford, Local Union No. 8164, and a number of local officers, alleging an illegal strike involving arbitrable issues in violation of a no-strike clause of a collective bargaining agreement with the International Union. Lorain prayed for a temporary restraining order and damages against all defendants incurred as a result of the strike. A temporary restaining order was granted the same day suit was filed. That evening the local union's officers read the court's order to the striking workers at the picket line, and they returned to their jobs the next morning.

Subsequently, a trial was held on the issue of damages. The District Judge ruled that individual union members were not liable in damages for breach of a no-strike clause regardless of whether the union was liable, relying upon *Sinclair Oil Corpora-*

tion v. *Oil, Chemical and Atomic Workers International Union,* 452 F.2d 49 (7th Cir. 1971), and dismissed the damage claim against them. Although denying damages for the first few days of the strike, he found the International Union liable for losses suffered Monday, July 19, and Tuesday, July 20. He concluded that from

> "after Sunday, July 18, 1976, the International Union, acting through its International Representative as well as through the officers of the Local Union, breached the no-strike clause of its collective bargaining contract with the Company by the failure and refusal of its agents from and after that date to take any further action whatever to seek, induce or procure a termination of the illegal work stoppage that had commenced upon the previous Thursday."

In reaching this conclusion, the trial judge interpreted the collective bargaining agreement to require the union actively to endeavor to prevent or terminate any strikes, a best efforts standard. The no-strike clause of the collective bargaining agreement provides in part:

> [T]he Union will not cause, sanction, or approve any employees represented by it to cause or participate in any strike. . . . On the contrary, the Union will actively discourage and endeavor to prevent or terminate any stoppage, slow-down, or other interruptions of work, and participation in such activities during this Agreement (or extension) shall result in discharge of all those employees responsible for such occurrences. . . . The Union shall not be liable for monetary damages for unauthorized strikes, work stoppages, etc. or other interruptions of work which are not authorized, supported, encouraged or ratified by it. . . .

Art. II. The trial judge interpreted the words "actively endeavor to terminate" as increasing the duty contracted for by the union beyond that imposed by operation of law.

On the morning of the walkout, Thursday, July 16, 1976, the president of the local met with company representatives concerning an employee's vacation and temporary transfers of employees. No resolution of the problem was reached. The District Court found that when word of the results of this conference circulated among the employees, there were rumors about a walkout. His finding that the local union representatives were in no manner involved in initiating or promoting a walkout but used their influence to attempt to avoid it is supported by substantial evidence. The District Judge further found that the International took positive action, such as President I. W. Abel's telegram asking that the strikers return to work and various acts of staff representative William Crawford in cooperation with local officers directed toward ending the strike.

The trial judge held, however, that the failure and refusal of the union agents to take any action after Sunday to try to terminate the admittedly illegal work stoppage constituted a ratification of the strike after that date. The failure of the union, after termination of the strike, to discipline those members who initiated it, was, he found, further evidence of ratification. Finally, the trial judge dismissed an item of damages claimed by the company.

Both parties have appealed the trial court's ruling. The International Union asks this Court to find that the District Judge erred in interpreting the contract to require it to take affirmative action to end the strike. It also asks that his finding that the union ratified the work stoppage be set aside as clearly erroneous and without foundation in the record. The company asks this Court to add as damages additional sums for losses during the earlier days of the strike or, in the alternative, to enforce liability for these additional sums on those defendants whom the trial judge dismissed.

Congress has provided that a union is not to be subjected to liability for a strike "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. "Clear proof" means proof which is clear, unequivocal, and convincing. *Ramsey* v. *UMW,* 401 U.S. 302, 311 (1971); *UMW* v. *Gibbs,* 383 U.S. 715, 737 (1966); *James R. Snyder Co.* v. *Edward Rose & Sons,* 546 F.2d 206, 209 (6th Cir. 1976). It is not the law in this circuit that a union is required to take affirmative action to end a strike, absent exceptional circumstances, *UMW* v. *Gibbs,* 383 U.S. 715 (1966); *Buckeye Power Co.* v. *Utility Workers Union,* No. 77-3286 (6th Cir. Oct. 16, 1979); *Carbon Fuel Co.* v. *UMW,* 582 F.2d 1346 (4th Cir. 1978), *aff'd,* 48 U.S.L.W. 4059 (Dec. 10, 1979). The best efforts doctrine of *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976), has been repeatedly disavowed in this circuit; *see, e.g., Southern Ohio Coal Co.* v. *UMW,* 551 F.2d 695, 701 (6th Cir. 1977), *cert. denied,* 434 U.S. 876 (1977); *North American Coal Corp.* v. *UMW,* 497 F.2d 459, 467 n.3 (6th Cir. 1974).

It is impossible to apply the concepts of ratification, authorization, or participation without comprehending the peculiar role which unions play in labor relations. It is not the union's role to act as an agent of the employer, to perform acts the employer requires, but to be the representative of its members. Obviously damages may not be awarded as a result of a union's performing its normal union functions, *UMW* v. *Gibbs,* 383 U.S. 715, 738-739 (1966); *Riverside Coal Co.* v. *UMW,* 410 F.2d 267, 275 (6th Cir. 1969), *cert. denied,* 396 U.S. 846 (1969). The union's actions in this case, examined in light of federal labor policy as interpretative of the standards to be applied in § 301 suits, *Boys Market, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 242 (1970); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957), do not support a finding of liability for damages on the part of the defendant.

Relying upon *Eazor Express, supra,* the District Judge imposed liability because of the union's inaction during the last two days of the strike. The trial judge based his holding in part on his interpretation of the collective bargaining agreement which he found to create a higher duty on the part of the union. A union may agree to assume a greater responsibility for ending illegal strikes than that imposed by law. *See* A. Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 Harv.L.Rev. 274, 306 (1948). However, liability is not properly imposed in the absence of specific language so requiring. *Penn Packing Co.* v. *Amalgamated Meat Cutters,* 497 F.2d 888, 891 (3d Cir. 1974); *cf. Latas Libby's Inc.* v. *United Steelworkers of America,* No. 79-1081 (1st Cir. Nov. 6, 1979). The trial judge read the term "actively discourage and endeavor to terminate" as imposing an additional duty on the union, the violation of which would subject it to damages. However, that term does not appear in the sentence dealing specifically with damages. The terms defining conduct which do appear in the sentence limiting liability for damages impose no higher a standard of responsibility than that of the law. The phrase on which the District Judge relies appears in a sentence which imposes as a sanction the discharge of employees participating in such a strike. Considering that in that position it serves a function, separate and apart from the question of defining standards of conduct which will subject the union to damages, it is inappropriate to imply its existence in the damages sentence as well. This is especially true where the language of the damages sentence is clear and unambiguous.

The company also argues that the District Judge concluded that the union had ratified the strike by its refusal and failure to take any action on Monday and Tuesday, the last two days of the strike. It is not clear whether this holding is independent of the District Court's construction that the collective bargaining agreement required "best efforts" on the part of the union. In either event it cannot stand.

A finding that failure to act for two days under the circumstances which existed constituted ratification is clearly erroneous. Inactivity for two days, where there is no requirement that the union take affirmative steps to end the strike, is not ratification. It is at best ambiguous. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1921), Chief Justice Taft ruled that a report by the national president of a union expressing sympathy with the purpose of certain acts of union members did not "indicate a desire to ratify the transaction as his work." *Id.* at 394. The District Judge expressly found that the union had not authorized, supported, or encouraged the work stoppage. He appears to have given no consideration to the fact that the union officials had done nothing that tended to cancel their past acts denouncing the strike. Their position was well known to the membership. Further, they had been advised previously that the company would seek a temporary restraining order on Monday. They agreed to make themselves available and not oppose this action. This willingness to cooperate must negate any ambiguity in their silence.

On appeal, the acts which the company urges most strongly as evidence of ratification are the union's attempts to discuss the substance of grievances with the employer. It appears to the Court that a distinction must be made between presenting grievances to the company as a means of asserting the validity of the strike as opposed to seeking to resolve hurdles which stood in the way of persuading the employees of the desirability of returning to work. As President Thomas stated, he intended by such discussion to benefit the plant. (Thomas Tr. 272). There exists a strong NLRA policy in favor of discussion of grievances, as distinguished from more formal grievance resolution procedures available. "The act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." *Fibreboard Paper Products Corp.* v. *NLRB*, 404 U.S. 203, 211 (1974). Congress has expressly imposed a duty on employers and unions to confer and endeavor to settle disputes expeditiously whenever one party

makes such a request. 29 U.S.C. § 74(a)(2). The legislative history of this section indicates that this duty continues to exist despite the presence of an arbitration agreement. [1947] U.S. Code Cong. & Ad. News 1135, 1169; *cf.* 29 U.S.C. § 108. Thus it is NLRA policy that discussion of issues is to be promoted as a means of removing grievances and improving and stablizing relations. As the Supreme Court recently noted, the cost of discussion is slight compared to the potential gains. *Ford Motor Co.* v. *NLRB,* 47 U.S.L.W. 4498, 4502 n.14 (May 14, 1979). Thus the union cannot be found to have supported the strike when it requested the company to discuss the workers' grievances.

The second act alleged as evidence of ratification or support of the strike was a failure to discipline strikers by the union. The employer repeatedly called upon the union to bring sanctions against its membership in order to get them back to work. These demands were made, although, as admitted at trial, company officials professed no knowledge of the method by which such sanctions may be imposed. (Black Tr. 100). It may be that "the availability of stronger persuasive measures is relevant to the critical question of the reasonableness of the steps which were taken." *U.S. Steel Corp.* v. *UMW,* 598 F.2d 363, 366 (5th Cir. 1979). It follows that their unavailability must also be a relevant factor. In this case, it is clear that disciplinary measures were both legally and practically unavailable to the union during the two-day period for which liability was found. National labor law forbids the imposition of sanctions unless the member is given written specific charges, reasonable time to prepare defenses, and a full and fair hearing. 29 U.S.C. §§ 411(5), 529. In addition, the union constitution provides a procedure which ensures due process and which accordingly requires some time to implement. (App. 96; Crawford Tr. 354-55, 360).

As a practical matter, since local members must vote on a decision to sanction, it is unlikely that any sanctions could ever have been effectively brought. (Crawford Tr. 478-79). It should

not be forgotten, and the employer was certainly aware, that discipline was a remedy available to it. *U.S. Steel Corp.* v. *UMW,* 519 F.2d 1249, 1255 (5th Cir. 1975). It is thus inappropriate for the employer to insist, as it did here, that the union take a step which it was not required to take, *id.*, which may not have been available to it, and which involves a purely internal matter, *U.O.P. Norplex* v. *NLRB,* 445 F.2d 155, 157 (7th Cir. 1971).

The fact that the union aided employees in presenting their grievances following the strike cannot be used as evidence of intent to support the strike, considering that federal law imposes on unions certain duties as representatives of their employees. *Vaca* v. *Sipes,* 368 U.S. 161 (1967). The union constitution gives discharged workers the right to bring a grievance. Art. VIII. The results of the arbitrator's decisions support a conclusion that the severity of the discipline meted out was unwarranted in virtually every case, *Koehring Co.*, 69 L.A. (1977). "It would be going very far to consider such acts . . . a ratification . . . creating liability for a past tort." *UMW* v. *Coronado Coal Co.*, 259 U.S. 344, 394 (1921). At the most, bringing grievances could indicate sympathy with the strikers' position, but that is not proof of "prior initiation" or a "desire to ratify the transaction as [the union's] work." *Id.*

The employer also urges that the union's refusal to join with it in seeking an injunction was evidence of an intent to support the strike. The union acknowledged from the inception of the walkout that the strike was illegal and did not oppose entry of a temporary restraining order. It is difficult to see how it could have done more to facilitate obtaining a TRO. Had it joined with the employer in seeking an injunction against itself, it is possible that the lower court would have been without jurisdiction to act, there being no case or controversy presented to it. U.S. Const. Art. III, § 2.

The one positive act which can be asserted to show an act of support by a union officer was Trustee Voile's appearance on

the picket line. The trial judge did not find this a basis for liability, and there is no evidence that Voile's actions were taken at the instigation of the union. He must be found to have acted in his personal capacity.

For the reasons stated, the judgment against the International Union is REVERSED. The judgment dismissing the individual defendants is AFFIRMED for the reasons given by the District Judge, that there is no action for damages against such individuals. The employer's remedy against such individuals must be discipline or discharge as provided by the collective bargaining agreement. The judgment in favor of the local union is likewise AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIV-1-76-145

Lorain Division of Koehring Company,

Plaintiff,

-vs.-

The United Steelworkers of America, A.F.L.-C.I.O., and William H. Crawford, its Staff Representative; Local Union No. 8164, The United Steelworkers of America, A.F.L.-C.I.O., its officers agents and representatives, Darwin Gooden, Bill Hendricks, Milton Miller, Leon B. Howington, Clyde Henshaw, Wilford McGill, James R. Voiles, James F. Blevins, Paul Thomas, Larry Pickett, Thomas Sampley, Frank Thomas, David Page, Jackie McClain, L. C. Ervin, and all other officers of the Unions and other employees whomsoever acting in concert with them for a common purpose,

Defendants.

ORDER

(Filed March 8, 1977)

This is an action for damages for violation of a collective bargaining agreement brought against two labor unions and certain individual officers and members. The case is presently before the court upon a motion to dismiss filed on behalf of the individual defendants.

For the reasons set forth in a memorandum filed herewith, it is accordingly ORDERED that the individual defendants be and the same hereby are dismissed from this action. The lawsuit will

remain as to the defendants, The United Steelworkers of America, A.F.L.-C.I.O., and Local Union No. 8164, The United Steelworkers of America, A.F.L.-C.I.O.

APPROVED FOR ENTRY.

Frank W. Wilson
United States District Judge

MEMORANDUM

This is a suit for violation of a collective bargaining agreement brought against two labor unions and certain individual officers and members. The complaint alleges that the defendant unions and the individual defendants engaged in a strike in violation of a no-strike provision contained in a collective bargaining agreement existing between the plaintiff and the defendant unions. The plaintiff seeks monetary damages suffered by it because of this alleged breach of contract.[1] Jurisdiction of this case is brought pursuant to section 301 of the National Labor Relations Act, as amended (29 U.S.C. §§ 185, *et seq.*). The case is presently before the court upon a motion to dismiss filed on behalf of the individual defendants.

In essence, it is the contention of the individual union officers and members that the defendant unions would be the sole source available for satisfaction of any judgment for damages arising from a breach of the collective bargaining agreement existing between the plaintiff and defendant unions. In support of this contention, the individual defendants cite section 301(b) of

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[1] Although the complaint originally sought both injunctive and monetary relief against the defendants, it appears that injunctive relief is no longer an issue in the lawsuit, the parties having informed the court that a settlement has been worked out regarding the injunctive portion of the lawsuit.

the National Labor Relations Act, 29 U.S.C. § 185(b), which provides in relevant part as follows:

> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courst of the United States. *Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.*" (Emphasis added)

From its response, it is noted that the plaintiff readily concedes the fact that if a judgment is obtained against the defendant unions in this lawsuit, then only the unions could be held liable. Such a result is clearly dictated by the decision in *Atkinson* v. *Sinclair Refining Company,* 82 S.Ct. 1318, 370 U.S. 238; 8 L.Ed.2d 462, (1962) wherein the Supreme Court commented on section 301(b) of the National Labor Relations Act [29 U.S.C. § 185(b)] as follows:

> "We have already said in another context that § 301(b) at least evidences 'a congressional intention that the union as an entity, like a corporation, should in the absence of agreement, be the sole source of recovery for injury inflicted by it' (*Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470, 4 L.Ed.2d 442, 450, 80 S.Ct. 489). This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable. The national labor policy requires and we hold that when a union is liable, for damages for violation of the no-strike clause, its officers

> and members are not liable for these damages. Here, Count II, as we have said, necessarily alleges union liability but prays for damages from the union agents. Where the union has inflicted the injury it alone must pay. Count II must be dismissed." 370 U.S. at 249, 8 L.Ed.2d at 471.

The plaintiff, however, distinguishes *Atkinson* by arguing that if liability cannot be found to lie against the defendant unions because the individual defendants acted in their personal and non-union capacity in breaching the collective bargaining agreement, then, under such circumstances, the individual defendants could be held personally liable for the damages suffered as a result of the breach. In *Atkinson,* it is noted the Supreme Court specifically reserved ruling on whether there can exist individual liability where the union is held not responsible for the breach of the collective bargaining agreement. *See Atkinson* v. *Sinclair Refining Company,* 8 L.Ed.2d at 471, n. 7.

Contending that union officers and members can be held personally liable for damages for a breach of a collective bargaining agreement existing between a union and employer where the union is found not liable for the breach, the plaintiff relies primarily upon *Duquoin Packing Company* v. *Local P-156, Amalgamated Meatcutters and Butcher Workmen of North America,* 321 F.Supp. 1230 (E.D. Ill. 1971). In that case the court for the Eastern District of Illinois denied a motion to dismiss similar to that filed in the instant case, and held that individual union officers and members could be held personally liable for violation of a no-strike clause contained in a collective bargaining agreement where it develops during the trial that the union was without fault.

Although it would initially appear that *Duquoin Packing Company* is good authority for plaintiff's position, in *Bacino* v. *American Federation of Musicians of the United States and Canada,* 407 F.Supp. 548 (N.D. Ill. 1976), a recent case from the Northern District of Illinois, it was reported that *Duquoin*

Packing Company had, by implication, been overruled by *Sinclair Oil Corporation* v. *Oil, Chemical and Atomic Workers International Union,* 452 F.2d 49 (7th Cir. 1971) which reached the opposite conclusion. In *Sinclair Oil Corporation* the Seventh Circuit carefully examined the legislative history of section 301 of the National Labor Relations Act (29 U.S.C. § 185) and found that Congress did not intend to provide a damage remedy for individual unauthorized breaches of a no-strike clause. Without attempting to repeat the discussion of the legislative history of section 301 which is contained in *Sinclair Oil Corporation,* the following passages from that decision summarize the finding of the appeals court. Rejecting the argument that individual union members could be held liable in damages for unauthorized breaches of a no-strike clause, the Seventh Circuit said:

> "It is true that the language of Section 301 does not expressly prohibit employer damage suits against employee union members who engage in a wildcat strike.
>
> "But Section 301 does not expressly authorize suits between an employee union member and his employer arising from bargaining contracts. And Section 301 (b) prohibits enforcement against employees or their assets of employer judgments against unions. We do not see how, in view of subparagraph (b) and the 'Danbury Hatters' notion discussed hereinafter, an implication can reasonably arise from the terms of Section 301 that Sinclair may recover damage against the individual defendants.
>
> "The legislative history of Section 301 does not disclose a Congressional purpose to authorize, in Section 301, an employer's suit against employee union members arising from a wildcat strike in violation of the bargaining agreement. The implied authorization urged by Sinclair cannot be reconciled with the intention of Congress shown in the debates in both Houses during consideration of the pro-

> posed Section 301. The legislative history of the Act indicates that the principal concern of Congress was with making unions, as parties to collective bargaining agreements, responsible for breaches of agreements and to avoid subjecting individual union members to fiscal ruin that was visited upon members as a result of the 'Danbury Hatters' decision.''[2] 452 F.2d at 52.

The Seventh Circuit thereafter concluded that the district court was correct in dismissing count 2 of the plaintiff's complaint which sought damages against individual union members for an unauthorized breach of a no-strike provision. The court stated:

> "Congress was well aware of the problems involved in reaching and enforcing no-strike agreements, and we think that when Section 301 was enacted it had no intention of subjecting union members engaged in wildcat strikes to individual liability for damages. We conclude that the primary remedy of Sinclair is discharge or discipline of individual defendants. *See* NLRB v. Rockaway New Supply Co., 345 U.S. 71, 80, 73 S.Ct. 519, 97 L.Ed. 832 (1953); Atkinson v. Sinclair Refining Co., *supra,* 370 U.S. at 246, 82 S.Ct. 1318. Of course the Union has the right to discipline its disobedient members. We conclude that count 2 does not state a claim upon which relief can be granted. The district court did not err in dismissing count 2." 452 F.2d at 54.

Although it does not appear that the Sixth Circuit has faced the question presented in the instant case, the court is persuaded by the reasoning of *Sinclair Oil Corporation* that the plaintiff

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[2] The "Danbury Hatters" decision refers to a 1908 Supreme Court case wherein the employer recovered damages against individual union members because execution of judgment could not be had on union assets. *See Loewe* v. *Lawlor,* 28 S.Ct. 301, 208 U.S. 274, 52 L.Ed. 488 (1908).

cannot maintain its action for damages against the individual defendants for an unauthorized breach of the no-strike provision contained in the collective bargaining agreement here involved. Accordingly, an order will enter sustaining the motion to dismiss filed on behalf of the individual defendants.

Frank W. Wilson
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-76-145

Lorain Division of Koehring Company

-vs.-

United Steel Workers of America, AFL-CIO and Local Union No. 8164, United Steel Workers of America, AFL-CIO

FINAL JUDGMENT

(Filed June 27, 1977)

This is an action for injunctive relief and for damages for alleged violation by the defendant unions and certain individual defendants of a no-strike provision contained in a collective bargaining agreement. The lawsuit was brought pursuant to section 301 of the National Labor Relations Act (29 USC §§ 185 et seq.). Injunctive relief was granted upon notice and without opposition and was effective in terminating the work stoppage here involved. No further issue remains in the lawsuit with respect to injunctive relief. Upon motion, a memorandum and order was entered dismissing the individual defendants from the damage action. The damage action against the defendant unions thereupon came on for trial before the Court sitting without a jury. The Court having entered findings of fact and

conclusions of law, this judgment is entered in accordance therewith.

It is accordingly ORDERED that the plaintiff's action against the defendant, Local Union No. 8164, United Steel Workers of America, AFL-CIO, be and the same hereby is dismissed.

IT IS FURTHER ORDERED that the plaintiff, Lorain Division of Koehring Company, have and recover of the defendant, United Steel Workers of America, AFL-CIO, the sum of $29,591.72, together with the costs of the cause.

APPROVED FOR ENTRY.

Frank W. Wilson
Unites States District Judge

FINDINGS OF FACT and CONCLUSIONS OF LAW

This is an action for injunctive relief and for damages for alleged violation by the defendant unions and certain individual defendants of a no-strike provision contained in a collective bargaining agreement. The lawsuit was brought pursuant to section 301 of the National Labor Relations Act (29 USC §§ *et seq.*). Injunctive relief was granted upon notice and without opposition and was effective in terminating the work stoppage here involved. No further issue remains in the lawsuit with respect to injunctive relief. Upon motion, a memorandum and order was entered dismissing the individual defendants from the damage action. The damage action against the defendant unions thereupon came on for trial before the Court sitting without a jury. The Court now enters the following findings of fact and conclusions of law based upon the full record in the lawsuit.

Findings of Fact

(1) The plaintiff, Lorain Division of Koehring Company, hereinafter sometimes referred to as the "Company", is a corporation and is an employer within the meaning of the National Labor Relations Act, 29 USC § 152(2). The plaintiff operates a manufacturing establishment in Chattanooga, Tennessee, where it is engaged in the manufacture and assembly of motor cranes. In July of 1976, at the time this lawsuit was initiated, the plaintiff employed approximately 125 production and maintenance employees in addition to supervisory, managerial, clerical and administrative personnel at its Chattanooga plant. In certain respects the Chattanooga operation is integrated with a similar operation conducted by the plaintiff at Lorain, Ohio, where the plaintiff also assembles motor cranes.

(2) The defendants, United Steel Workers of American, AFL-CIO, hereinafter referred to as "International Union", and Local Union No. 8164, United Steel Workers of America, AFL-CIO, hereinafter referred to as the"Local Union", are unincorporated labor organizations within the meaning of the National Labor Relations Act [29 USC § 152(b)]. At all times relevant to the issues in this lawsuit the Local Union was duly chartered pursuant to the constitution and bylaws of the International Union. The International Union was certified by the National Labor Relations Board on April 19, 1973, as the collective bargaining representative for the production and maintenance employees at the plaintiff's Chattanooga plant.

(3) The plaintiff and the International Union executed a collective bargaining agreement under date of July 1, 1975, the agreement to expire by its terms upon June 30, 1978 (Ex. #3). The defendant Local Union was not a party signatory to the said contract. The agreement governed the maintenance and production employees at the plaintiff's Chattanooga plant. Among other matters the agreement provided a normal four-step procedure for the settlement of grievances and contained a no-strike agreement as follows:

"ARTICLE 2 - STRIKES, LOCKOUTS, UNION ACTIVITY. There shall be no lockout by the Company, and the Union will not cause, sanction, or approve any employees represented by it to cause or participate in any strike, stoppage, slowdown or other interruption of work during the term of this Agreement, or any extension thereof mutually agreed to. On the contrary, the Union will actively discourage and endeavor to prevent or terminate any stoppage, slow-down, or other interruption of work, and participation in such activities during this Agreement (or extension) shall result in discharge of all those employees responsible for such occurrences. Any notice of discharge under this clause will be stated in writing to the employee(s) with copies to the Union and the President of the Local. All such notices mailed, will be sent by registered mail with a return receipt requested. The Union shall not be liable for monetary damages for unauthorized strikes, work stoppage, etc. or other interruptions of work which are not authorized, supported, encouraged or ratified by it or its officers, or committeemen or duly authorized agents of the Union. Any employee discharged or disciplined under this article shall have recourse to the grievance procedure, including arbitration."

(4) During the morning of Thursday, July 15, 1976, representatives of the Local Union met with company representatives for an informal discussion of certain grievances, including the vacation request of a certain employee and including certain practices of the Company in making temporary transfers of employees. When word of the results of this conference circulated among the employes, rumors developed that some of the employees were talking of initiating a walkout. The weight of the evidence would indicate that the Local Union officers and representatives were not in any manner involved in initiating or promoting a walkout among the employees. On the contrary, it appears that the Local Union representatives, upon learning of

the rumors of a walkout, sought to use their influence to avoid the walkout by reminding the employees of the no-strike provision in the collective bargaining contract and of the employees' obligation to follow the procedure set forth in the contract for the settlement of grievances. The efforts of the Local Union representatives in this regard were to no avail, however, with the result that following the noon lunch hour all but a small number of the production and maintenance employees refused to return to their jobs.

(5) At the urging of the Company, the Local Union representatives again sought to use their influence to have the employees return to their jobs. When these efforts were unsuccessful, a Company representative read a statement to the assembled employees reminding them of the no-strike provisions and grievance procedures in their union contract and advising them that they would automatically be discharged unless they returned to their work within 15 minutes (Ex. #4). Following the reading of this statement by the Company representative, the Local Union representatives sought to induce the other employees to return to their job by themselves returning to the plant. Five or six other employees also returned. All other employees, however, refused to return to their work, departed from the plant premises, and posted pickets at the plant gate. The strike thus initiated resulted in the termination of all production at the Chattanooga plant until the strike ended upon the following Wednesday as hereinafter recounted.

(6) During the afternoon of July 15, 1976, further efforts were made by the Local Union representatives to induce the striking employees to return to work, although such efforts appear at best to have been rather timid and modest. It appears that rather than insisting and urging that the striking employees abide by their union contract, the principal efforts of the Local Union representatives during the afternoon of the first day of the strike was to attempt to negotiate the strikers' grievances with the Company as a means of ending the strike. The Com-

pany refused such negotiations insisting that the employees abide by the no-strike provision of the contract and submit grievances in the manner provided by the contract. However, during the course of the afternoon the Company did send out a letter to the employees advising that the "discharge" order issued earlier had been modified to a "suspension". (Ex. #5)

(7) At the time the work stoppage occurred upon July 15, 1976, the International Union representative, William Crawford, was out of the city attending a union meeting in West Virginia. He was unaware of the strike and of the circumstances leading up to the strike until he was contacted by telephone during the afternoon by a Company representative and advised of the work stoppage. He thereupon arranged to return to Chattanooga the following day, Friday, July 16, and to have the Local Union president call a meeting of the union membership for the following Sunday afternoon, July 18.

(8) Upon Friday, July 16, 1977, the strike continued with pickets being maintained at the plant gate and with a large number of striking employees gathering in a lot next to the plant gate but refusing to return to work. Only one production employee returned to work on that day. All of the local union officials remained off work, contending that the attitude of the other employees was hostile and that they were fearful to cross the picket line. In the meanwhile, the Company had advised the International Union President, I.W. Able, of the unlawful work stoppage and he responded with a telegram to the Local Union president as follows:

> "I HAVE BEEN INFORMED THAT THE MEMBERS OF LOCAL UNION 8164 ARE ENGAGED IN AN UNAUTHORIZED WORK STOPPAGE IN VIOLATION OF THE INTERNATIONAL CONSTITUTION AND OUR WORKING AGREEMENT WITH LORAIN DIVISION, KOEHRING COMPANY. IF SUCH A WORK STOPPAGE IS IN PROGRESS THEN THE

MEMBERS OF LOCAL UNION 8164 SHOULD RETURN TO WORK AT ONCE AND PROCESS THEIR GRIEVANCES THROUGH THE REGULAR MACHINERY"

The telegram was delivered to the Local Union president around noon on Friday while he was assembled with the striking employees near the plant gate. He did not read the telegram to the assembled employees or to the pickets, but did discuss it with other members of the Local Union committee. He then arranged to go to the plant with a committee "to resolve the matter". Neither he nor his committee had any difficulty in crossing the picket line. In fact, there was never any incident at the picket line throughout the duration of the strike. Administrative and other personnel passed freely in and out of the plant and there appears to have been no incident in regard to the one production employee who also reported to work upon Friday. The negotiations between the Local Union committee and the Company upon Friday afternoon were not successful in resolving the issues or terminating the strike. At this meeting the union committee sought to negotiate the prior grievances and to have the Company agree to withdraw any threat of discipline against the striking employees. The Company refused to alter its position on any of these issues but rather insisted that the employees return to work on Monday and that the Company would then resolve the matter of discipline, if any, and the Union could process any grievances pursuant to the contract grievance procedure. By the time of the meeting on Friday afternoon the Company had sent out another letter to all employees further modifying its early discharge and suspension order (Ex. #9).

(9) There were no developments of any significance upon Saturday, July 17, in regard to the strike, that day normally being a nonwork day for production employees. Some limited production work had been scheduled, but no production employees reported. A picket was maintained at the plant gate over the weekend.

(10) A membership meeting of the Local Union was held upon Sunday, July 18. The International staff representative, Mr. Crawford attended the meeting, along with the Local Union officials. The International representative and the Local Union president appear to have made some attempt to urge the employees to return to work at the meeting, but the meeting was disorderly, the membership was hostile, and the meeting broke up with nothing further being accomplished.

(11) Following the Sunday union membership meeting all further efforts on the part of the International Union representative and on the part of the Local Union officers to lead, urge, advise, admonish, or discipline the union membership in an effort to have them return to work ceased. Rather, upon both Monday and Tuesday, July 19 and 20, the International representative called the Company and advised that the Local Union officials would not report for work, but that both he and they would be available to negotiate with the Company if the Company so desired. He advised, however, that the union representatiaves would not cross the picket line for such negotiations.

(12) Over the weekend the Company requested the International Union and the Local Union to join with them in seeking to have the work stoppage enjoined. While not resisting any action of the Company in this regard, the International representative declined to join the Company in seeking an injunction. Upon Tuesday, July 20, 1976, the Company filed this lawsuit, seeking among other matters to have the strike enjoined pursuant to section 301 of the National Labor Relations Act (29 USC § 185). Counsel for the defendant Union appeared at the hearing upon the Company's motion for a temporary restraining order and did not resist the motion. The injunction was issued and served upon Tuesday, July 20, at 4:15 p.m. with the result that the pickets were withdrawn and with the further result that the production and maintenance employees returned to their work at the commencement of the day shift upon

Wednesday, July 21. The strike was effective in stopping production at the plaintiff's Chattanooga plant for 3½ days, or from 11:30 a.m. Thursday, July 15, through Tuesday, July 20. Following the termination of the strike, disciplinary action was taken by the Company with respect to certain employees. The Unions are presently processing grievances on behalf of the disciplined employees. While no strike benefits were paid by the Union during the course of the strike, it further appears that no disciplinary action was ever considered or taken by the Union with respect to any employee participating in the strike.

(13) The weight of the evidence indicates that the plaintiff incurred additional expenses in the following amounts as a result of the 3½ days strike.[1]

(1)	Chattanooga Plant continuing overhead expense pro ration (See Ex. #17)	$13,060.00
(2)	Lorain Division (Chattanooga and Lorain, Ohio Plant) continuing overhead expense pro ration (See Ex. #19)	$34,198.00

[1] The principal thrust of the defendants' attack upon the plaintiff's proof of damages is that the plaintiff failed to establish any loss of sales or loss of profits as a result of the strike. Loss of sales is not relevant to the issue as to whether increased costs of production were incurred with respect to units produced for sale. Loss of profits is only one method of proving damages in a lawsuit of this nature.

(3)	Direct strike expenses[2] (See Ex. #22)	2,002.46
(4)	Legal fees and expenses incurred prior to termination of the strike	2,525.04
	TOTAL	$51,785.50

Conclusions of Law

(1) This Court has jurisdiction of the parties and of this lawsuit pursuant to section 301 of the National Labor Relations Act (29 USC § 185).

(2) While the Local Union was not a party signatory to the collective bargaining contract here involved, the Court concludes that it was duly chartered by the International Union for the express purpose of aiding and assisting the International Union in the administration of the collective bargaining contract between the International Union and the Company. The Court accordingly concludes that the officers of the Local Union were acting as the duly authorized agents of the International Union in connection with their activities as they relate to the work stoppage that occurred at the plaintiff's plant upon July 15 through July 20, 1976. The Court further concludes that the International Representative, Mr. Crawford, was also a "duly authorized agent" of the International Union in connection with his activities as they relate to the said work stoppage.

(3) The Court concludes that neither the Local Union officers nor the International Representative was in any wise

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[2] The Court is of the opinion that the expense item of $15,458 listed in Exhibit #22 as due Alexander Proudfoot & Associates, Management Consultants, should be disallowed as a strike expense, as it appears that the loss, if any, was occasioned by the unwillingness of the Proudfoot employees to cross the picket line. The plaintiff would have no more obligation to pay for non-working Proudfoot employees than it would to pay for non-working Lorain employees.

responsible for initiating the work stoppage that began upon Thursday, July 15, 1976. Nor did they "cause, sanction or approve" the same. Rather, it appears that the work stoppage was caused by employees within the bargaining unit acting upon their own initiative. The Court further concludes that neither the Local Union officers nor the International Representative was responsible for the continuance of the work stoppage through the second day of the strike, Friday, July 16, 1976. Although the efforts of the Local Union officials to exercise discipline over their members and to accomplish a termination of the work stoppage were somewhat modest upon both Thursday and Friday, July 15 and 16, 1976, it does appear that they were nevertheless seeking on those dates to effect a termination of the strike. Their task in this regard was certainly made no easier by the action of the Company in utilizing its ultimate weapon in the very initial phase of the work stoppage, that is to say by the action of the Company in issuing an ultimatum that any striking employee not returning to his job within 15 minutes would be automatically discharged.

(4) As reflected in the findings of fact, the International Representative was out of the state at the time the work stoppage commenced. It appears that he made a reasonably prompt return to Chattanooga upon learning of the strike. Moreover, even before he returned he had initiated action to call a union meeting for Sunday, July 18. Under the circumstances these actions would appear to have been reasonable endeavors on his part during this period to effect a termination of the strike. The strike not having been initiated by the Union or its authorized agents, both the Union and its authorized agents would be entitled to a reasonable period of time after the initiation of the strike in which to take the action required of them under the terms of the collective bargaining contract. *Eazor Express* v. *International Brotherhood of Teamsters et al*, 357 F.Supp. 158 (W.D. Pa.,1973).

(5) The Court concludes that from and after Sunday, July 18, 1976, the International Union, acting through its International Representative as well as through the officers of the Local Union, breached the no-strike clause of its collective bargaining contract with the Company by the failure and refusal of its agents from and after that date to take any further action whatever to seek, induce or procure a termination of the illegal work stoppage that had commenced upon the previous Thursday. From and after Sunday both the International Representative and the Local Union officers abandoned all efforts to effect a return to work of the union members, casting the entire burden of procuring a termination of the strike upon the Company. Under the terms of its contract with the Company, the International Union agreed not only to refrain from causing or participating in a work stoppage during the term of the contract, but also agreed to "actively . . . endeavor to . . . terminate any work stoppage . . ." The International Union also agreed not to take action which would constitute a ratification of the strike. While the contract by its terms expressly relieves International Union of liability for monetary damages for an unauthorized strike, the contract further expressly provides that such limitation on liability for monetary damages does not extend to a work stoppage ". . . encouraged or ratified by . . . duly authorized agents of the Union." The Court concludes that the failure and refusal of the union agents to take any action after Sunday, July 18, in an effort to terminate the admittedly illegal work stoppage constituted a ratification of the strike from and after that date. This conclusion is further reinforced by the failure and refusal of both the Local Union and the International Union since the termination of the strike to seek to either identify or discipline those members who initiated the illegal work stoppage.

(6) In an action under 29 USC § 185 for damages caused by a union's breach of a no-strike provision in a collective bargaining contract, the measure of damages recoverable is the actual loss

sustained by the plaintiff as a direct result of the breach. *See Eazor Express, Inc.* v. *International Brotherhood of Teamsters, Etc.*, 520 F.2d 951 (3rd Cir. 1975); ANNOT., 92 ALR 2d 1232. This is the loss which may reasonably and fairly be considered as naturally arising from the particular breach of contract involved and which may reasonably be supposed to have been in the contemplation of the parties at the time the agreement was entered into in the event of such violation. *See* 48 AM.JUR.2d "Labor and Labor Relations" § 1323. One way of determining the actual loss incurred by an employer as a result of the union's breach of a no-strike agreement is to ascertain the amount of loss in fixed overhead sustained by reason of the strike. *See Wagner Electric Corporation* v. *Local 1104, International Union of Electrical, Radio and Machine Workers*, 496 F.2d 954 8th Cir. 1974). This method of determining damage stems from the fact that usually an employer has fixed overhead charges which he incurs whether or not there is a strike, such as plant maintenance, salaries of essential personnel retained during the strike, property insurance and taxes, social security taxes, workmen's compensation and group insurance, and pension liability. Consequently, when productive labor in a plant is reduced for any period to less than normal, the employer sustains a loss in necessary overhead for which it receives no production. Thus, in the case of a complete shutdown, the struck employer has been held entitled to recover his daily overhead times the number of days the strike lasted. *See Structural Steel & Ornamental Iron Association* v. *Shopmen's Local Union of International Association, Etc.*, 172 F.Supp. 354 (D.C.N.J. 1959); 48 AM.JUR.2d "Labor and Labor Relations" §1323.

(7) The illegal work stoppage having continued for a total of 3½ work days, the Company having incurred losses over that period attributable to the illegal work stoppage in the total sum of $51,785.50, and the International Union having been found to have breached the no-strike clause of its collective bargaining contract with the Company with respect to the last two days of

the strike only, the Court concludes that the Company would be entitled to recover of the International Union damages in the sum of $29,591.72, such damages being calculated upon the basis of pro rating the total damage incurred within the 3½ day period of the strike to the two day period for which the International Union has been found to have breached its contract with the Company (151,785.50 x 2/3½ days or 4/7 equals $29,591.72).

(8) This lawsuit will be dismissed as to the Local Union, that defendant not having been a party signatory to the collective bargaining contract.

An order will enter in accordance with these findings of fact and conclusions of law.

Frank W. Wilson

United States District Judge

APPENDIX C

No. 77-1678-9

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United Steelworkers of America, et al.,
Appellant-Cross Appellee,
v.
Lorain, a Division of Koehring Company,
Appellee-Cross Appellant.

ORDER

(Filed April 4, 1980)

BEFORE: WEICK, KEITH and KENNEDY, Circuit Judges

Appellee's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit.

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

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Clerk

APPENDIX D

NATIONAL LABOR RELATIONS BOARD

Title III

Suits By And Against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the Untied States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purpsoes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a

labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Supreme Court, U.
FILED
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MICHAEL RODAK, JR., C

No. 80-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-56

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seems to raise three issues. As we show herein, two of these issues have already been settled by this Court, in a manner adverse to the claims of petitioner; the remaining issue was also rightly decided below and in any event involves nothing of general applicability, consisting merely of a claim that the court of appeals erred in construing the unique language of a particular collective-bargaining agreement and in applying that language to the specific facts of this case. Thus this case does not warrant review by this Court.

1. Petitioner contends that the collective-bargaining agreement between the Company and the Union [1] should be construed as providing that the Union will be answerable in damages for any failure to use its "best efforts" to terminate a work stoppage undertaken by employees without the Union's authorization. Pet. 10-14. The contract in question contains a "no-strike clause" which is unique in that it defines not only the actions which the Union is expected to undertake in connection with a work stoppage, but also the specific circumstances in which the Union may be held "liable for monetary damages" in connection with a stoppage.[2]

To the extent petitioner contends that the court of appeals erred in holding that the parties' unique no-strike clause did not contemplate damages in the circumstances of this case,[3] we show at pp. 4-7 *infra* that petitioner raises no general question of federal labor law, but solely a question as to whether the court of appeals properly construed the particular (and unique) language of the parties' contract, as applied to the specific facts of this case. However, petitioner also seems to suggest that notwithstanding the particular language of the no-strike clause, any union that enters an agreement to arbitrate grievances rather than to strike thereby incurs, by operation of the federal labor laws, liability in damages whenever the union does not use its "best efforts" to terminate a strike undertaken by its members without the union's authorization. Pet. 10-11. That suggestion is foreclosed by this Court's decision last Term in *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212 (1979).

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[1] For purposes of this opposition the term "Union" refers collectively to both respondents, the United Steelworkers of America, AFL-CIO-CLC, and its Local 8164.

[2] See pp. 4-5 *infra*.

[3] See Pet. 12-14.

In *Carbon Fuel*, the employer urged that an obligation on the part of a union "to use all reasonable means to prevent and end unauthorized strikes in violation of the collective-bargaining agreement . . . [should be] implied in law because the agreement contains an arbitration provision. . . ." *Id.* at 216. This Court "reject[ed] petitioner's suggestion that Congress' policy in favor of arbitration extends to imposing an obligation on [unions] which [have] agreed to arbitrate grievances, to use reasonable means to try to control [unauthorized strikes]." *Id.* at 218. In so holding, the Court expressly rejected the decision of the Third Circuit upon which petitioner relies, *Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). See *Carbon Fuel*, 444 U.S. at 212.[4] And the Court specifically approved the Sixth Circuit's refusal to follow *Eazor*. See 444 U.S. at 215-216, n. 4, citing *Southern Coal Co.* v. *UMWA*, 551 F.2d 695 (6th Cir. 1977). Thus, while petitioner points to this former conflict between the Third and Sixth Circuits and asks the Court to resolve it in favor of the Third Circuit, the fact is that the Court resolved the conflict last Term, in favor of the approach

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[4] In *Eazor*, as here, the no-strike clause was expressed in the contract, rather than implied as in *Carbon Fuel*. Both the Third Circuit and the author of the district court opinion in *Eazor* have recognized that the rationale of *Eazor* does not survive *Carbon Fuel*. See *Pittsburgh Steel Co.* v. *Steelworkers*, —— F.2d ——, 105 LRRM 2198, 2201-2203 (3d Cir. Aug. 6, 1980); *Lakeshore Motor Freight* v. *Local 800, Teamsters*, 483 F.Supp. 1150, 1152 (W.D. Pa. 1980) (Teitelbaum, J.). The analysis of *Carbon Fuel*, respecting the question whether a "best efforts" type duty should be implied in law, does not depend upon whether the no-strike clause is express or implied. This Court predicated its rejection of that duty on the recognition that "the legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency." 441 U.S., at 216 (footnote omitted).

articulated by the Sixth Circuit in *Southern Coal*, and followed in the instant case.

2. It is of course true that under *Carbon Fuel* a union may assume by contract the duty to use "best efforts" which this Court found not to be otherwise imposed by federal labor law. The contract here contains an explicit clause governing not only the Union's obligation with respect to work stoppages, but specifically the circumstances in which the Union may be held liable in damages for its conduct in connection with a stoppage. The court of appeals held that under the specific terms of this contract, the Union's conduct in this case did not fall within the category for which the parties agreed that damages may be recovered. Petitioner seeks to challenge that holding here. As we now show, that holding was correct; and since the court of appeals merely applied a particular private contract (and to our knowledge, a unique one) to a specific set of facts, review would not be warranted even if the court of appeals had erred.

The collective bargaining agreement between petitioner and the International Union contained the following provision:

> ARTICLE 2—STRIKES, LOCKOUTS, UNION ACTIVITY. There shall be no lockout by the Company, and the Union will not cause, sanction, or approve any employees represented by it to cause or participate in any strike, stoppage, slowdown or other interruption of work during the term of this Agreement, or any extension thereof mutually agreed to. On the contrary, the Union will actively discourage and endeavor to prevent or terminate any stoppage, slow-down, or other interruption of work, *and participation in such activities during this Agreement (or extension) shall result in discharge of all those employees responsible for such occurrences.* Any notice of discharge under this clause

> will be stated in writing to the employee(s) with copies to the Union and the President of the Local. All such notices mailed, will be sent by registered mail with a return receipt requested. *The Union shall not be liable for monetary damages for unauthorized strikes, work stoppage, etc. or other interruptions of work which are not authorized, supported, encouraged or ratified by it or its officers, or committeemen or duly authorized agents of the Union.* Any employee discharged or disciplined under this article shall have recourse to the grievance procedure, including arbitration. (App. 19, emphasis added).

As both the district court [5] and the court of appeals [6] recognized, this provision explicitly declares that the Union cannot be held liable for monetary damages in connection with a work stoppage unless the stoppage was "authorized, supported, encouraged or ratified by it or its officers, or committeemen or duly authorized agents of the Union." [7]

The district court found that the Union was not "in any way responsible for initiating the work stoppage"; rather, the stoppage was caused "by employees . . . acting upon their own initiative." App. A-26. The district court found that through the first three days of the five-day

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[5] App. A-27.

[6] App. A-5.

[7] Contrary to petitioner's assertion (see Pet. at 8, 13-14), the court of appeals did not refuse, because of the "prevailing Circuit philosophy," to give effect to the language in Article 2 of the agreement which states that the Union is to "actively discourage and endeavor to prevent or terminate" work stoppages. The court simply concluded, on the basis of unambiguous contract language, that breaches of that particular clause do not give rise to a claim for damages, because the contract expressly provides that "the Union shall not be liable for monetary damages" unless the union "authorized, supported, encouraged or ratified" a strike. App. A-5. See also the decision of the district court, App. A-27.

strike the Union did not "authorize, support, encourage or ratify" the strike in any way; to the contrary, the Union endeavored to end the strike. As the district court put it, during the first three days of the strike the Union made "reasonable endeavors . . . to effect a termination of the strike." *Ibid.* The court found that during this period, the Union officers on several occasions "sought to use their influence" first "to avoid the walkout" and then "to have the employees return to their jobs." App. A-20. When these efforts bore no fruit, the officers "sought to induce the other employees to return to their job by themselves returning to the plant." *Ibid.* Despite these and other efforts by the Union (App. A-20 - A-23), the employees refused to heed the Union's call to return to work.

The district court found that following these unsuccessful efforts to prevent and terminate the strike, the Union "abandoned all efforts to effect a return to work of the union members. . . ." App. A-27. The court "conclude[d] that the failure and refusal of the union agents to take any action after Sunday, July 18, in an effort to terminate the admittedly illegal work stoppage constituted a *ratification* of the strike from and after that date." *Ibid.* (emphasis added). (The strike ended two days later, when the Company filed a motion for a temporary restraining order which the Union did not resist. App. A-23.)

The court of appeals held that in the particular circumstances of this case, the district court had erred in concluding that the Union's failure—for the two day period between its last attempt to end the strike and the end of the strike—to repeat its unsuccessful efforts to end the strike constituted a "ratification" of the strike within the meaning of the parties' agreement. The court stated: "A finding that failure to act for two days under the circumstances which existed constituted ratification is

clearly erroneous." App. A-6. Petitioner asks this Court to grant certiorari to overturn the court of appeals' conclusion.

In the circumstances of this case, the court of appeals was correct in concluding that the Union's failure over a two day period to repeat its sincere but unsuccessful efforts to terminate the strike cannot be viewed as "ratification" of the strike [8] within the meaning of the particular contract here involved.[9] But in any event, the court's decision, being limited to the construction of the unique terms of a particular contract on a specific set of facts, does not warrant this Court's review.[10]

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[8] Cf. *Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 394 (1921).

[9] As discussed (see note 7, *supra*), while the contract states that the Union is to make certain efforts to "prevent or terminate" a work stoppage, the parties agreed that a breach of that obligation would not give rise to a claim for damages; rather, damages may be awarded only if the Union "authorized, supported, encouraged or ratified" the stoppage. By equating a cessation of the Union's efforts to terminate the work stoppage with a "ratification" of the stoppage, petitioner would simply write out of the contract the explicit limitation on damage liability to which the parties agreed.

[10] Petitioner contends that the First Circuit reached a different conclusion on "remarkably similar" facts in *Latas Libby's Inc.* v. *Steelworkers*, 609 F.2d 25 (1st Cir. 1979). The facts are not similar. The contract at issue in *Latas Libby's* stated that "no officer or representative of the Union or employee shall authorize, instigate, aid or condone" any work stoppage. *Id.* at 26. The court of appeals held the Union had "authorized" a strike, relying on testimony that an agent of the Union had advocated "that the men should go on strike immediately. . . ." *Id.* at 29. The court also held that the union had "condoned" the strike, because the dictionary meaning of "condone" is "[to] permit the continuance of." *Ibid.* In the instant case, by contrast, no union agent advised the employees to strike, and the contract does not provide that the Union is liable in damages if it should "condone" a strike; rather,

3. Petitioner's attempt to recover damages from individual officers and members of the Union is foreclosed by *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). *Atkinson* held that where an employer alleges that a union has violated a no-strike clause, the employer's cause of action under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, lies only against the union, even if the complaint alleges that individual officers and members acted as the Union's agents in breaching the contract. *Id.* at 246-249. That is to say, if "[p]roof of the allegations of [the employer's complaint] would inevitably prove a violation of the no-strike clause by the union itself," the complaint "fail[s] to state a claim for which relief can be granted [against officers or members]—whether the contract violation charged is that of the union or that of the union plus the union officers and agents." *Id.* at 247. Thus, *Atkinson* squarely holds that a § 301 suit against officers and members must be dismissed if the complaint alleges that the officers and members acted on behalf of the union in breaching a no-strike clause. The Court reserved the question whether a complaint "would state a proper § 301(a) claim if it charged unauthorized, individual action" (*id.* at 249, n. 7)—i.e., if the complaint alleged that the officers or members acted on their own, *ultra vires*, rather than as agents of the union.

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the Union can be liable in damages only if it "authorized, supported, encouraged or ratified" a strike.

Petitioner also suggests that the decision in this case on this question of interpretation of the no-strike clause somehow conflicts with that of the Fifth Circuit in *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1249 (5th Cir. 1975), *on rehearing*, 526 F.2d 377 (1976). This suggestion is inexplicable, for the contract in *United States Steel* did not contain a no-strike clause. See 519 F.2d at 1252. *United States Steel* dealt with the question, subsequently settled by *Carbon Fuel*, whether there is a "best efforts" duty created by the federal labor laws (see pp. 2-3, *supra*).

The complaint in this action did not allege "unauthorized, individual action." To the contrary, the complaint alleged *only* that the no-strike clause had been breached by "the Defendant Unions through its officers, agents and representatives." Complaint, para. VIII-XII.[11] The complaint is therefore indistinguishable from the complaint in *Atkinson*, and the district court was accordingly correct in granting the motion to dismiss as to the individual defendants.[12]

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[11] Joint Appendix in the Court of Appeals, pp. 4-5.

[12] Petitioner contends this case presents the issue which the Court reserved in *Atkinson*, because here the court of appeals ultimately held that the work stoppage was in fact not authorized by the Union. But in determining whether petitioner's complaint against the officers and members was properly dismissed, the question is what the complaint *alleged*—not what petitioner proved (or more accurately, failed to prove) at the trial respecting the Union's liability. *Atkinson* holds that a § 301 suit against officers or members must be dismissed unless the complaint alleges that the defendants were acting on an unauthorized basis. *Id.* at 249, n. 7. If, as is the case here, the complaint alleges that the officers and members were acting as agents of the Union, *Atkinson* holds that the complaint must be dismissed for failure to state a claim. Thus, the question reserved in *Atkinson* is not presented here.

Even if this case *did* present the issue reserved in *Atkinson*, review would not be warranted. The two courts of appeals which have addressed that issue have both reached the same answer—namely, that officers and members cannot be sued under § 301 even when unauthorized action is alleged. *Complete Auto Transit, Inc.* v. *Reis*, 614 F.2d 1110, 1114-1116 (6th Cir. 1980); *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers*, 452 F.2d 49 (7th Cir. 1971). Since the issue has reached the courts of appeals only twice in the 18 years since *Sinclair* (and has rarely reached the district courts, see Pet. at 15), and the circuits are in agreement on the point, review would not be warranted even if the issue proffered by petitioner were actually presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. This Court has recently granted a writ of certiorari to review the decision in *Complete Auto Transit, Inc.* v. *Reis,* No. 79-1777. The question presented in that case is identical to one of the questions presented by the instant Petition. Thus, both cases squarely raise the issue of whether individual employees may be held liable for damages when they engage in an admittedly unlawful wildcat strike where the union is shown not to be liable. *See* Pet. 2-3 (Questions Presented C and D); 14-16.

2. In the Opposition to the Petition, Respondents appear to contend that Petitioner did not seek relief against individual employees for their participation in the unlawful strike. *See* Opposition to Petition at 8-9 and n.12. This is absolutely incorrect. Petitioner proceeded against the Union, as an entity, and the individual striking employees *alternatively,* and it did so in both lower courts.

Plaintiff's position in the District Court may be easily seen at page 13 of the Appendix to the Petition. There, in its Memorandum Decision dismissing the claim against the individual strikers, the District Court specifically noted Petitioner's position on this question:

> "The plaintiff [Petitioner], however, distinguishes *Atkinson* by arguing that if liability cannot be found to lie against the defendant unions because the individual defendants acted in their personal and non-union capacity in breaching the collective bargaining agreement, then, under such circumstances, the individual defendants could be held personally liable for the damages suffered as a result of the breach. In *Atkinson,* it is noted the Supreme Court specifically reserved ruling on whether there can exist individual liability where the union is held not responsible for the breach of the collective bargaining agreement. *See Atkinson* v. *Sinclair Refining Company,* 8 L.Ed. 2d at 471, n.7."

The District Court disagreed and held that an action against individual strikers could not lie, even if the union itself were not responsible for the admittedly unlawful strike. In so holding, it specifically relied upon the Seventh Circuit's decision in *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers,* 452 F.2d

49 (7th Cir. 1971). *See Pet. App.,* A-14-15. This is precisely the same authority relied upon by the Sixth Circuit in *Complete Auto Transit, Inc.* v. *Reis,* 614 F.2d 1110 (1980).

Petitioner also raised this question in the Court of Appeals. *See* Petitioners' Brief in Court of Appeals at 34-36. Nevertheless, the Court of Appeals affirmed the District Court's decision, "for the reasons given by the District Judge . . . ."

Thus, contrary to Respondents, the issue of individual liability is clearly before the Court in this case. As noted, this is the same issue raised by *Complete Auto Transit.* This Court should accordingly grant the writ and schedule this case for argument and, possibly, for decision with *Complete Auto Transit.*

3. Respondents also attempt to characterize the other issue in this case as one revolving in a "unique" collective bargaining contract, "involv[ing] nothing of general applicability." Opp. at 1. This, too, is simply incorrect. The contract involved specifically provided for the Union to "actively . . . endeavor . . . to terminate" any illegal strike. The District Court found a breach in this regard, holding that the Union failed to satisfy this affirmative duty. Pet. App., A-27. The District Court also found, *id.,* that the Union ratified the unlawful strike in much the same manner as did the First Circuit in *Latas Libby's, Inc.* v. *Steelworkers,* 609 F.2d 29 (1979).

The Court of Appeals held that the ratification finding was clearly erroneous. In addition, it went on to hold that damages could not be recovered for the Union's failure to use its best efforts to terminate the

strike, despite its express contractual undertaking to do so. It reasoned that since the contract provided against liability for a *work stoppage* that was not "authorized, supported, encouraged or ratified" by the Union, a breach of the affirmative obligation to terminate a strike could not result in damages. While the Court of Appeals' decision may be seen as patently incorrect in this regard, it also strikes at the very heart and purposes of Section 301 of the Act, 29 U.S.C. § 185. Obviously, a contract provision precluding liability for an unauthorized strike does nothing to prevent recovery for the breach of another provision calling for the Union to use its resources to terminate that strike. The Court of Appeals' decision seems to say that an affirmative "best efforts" undertaking by a union is utterly meaningless unless the contract also provides a specific remedy for its breach. Certainly this goes far beyond this Court's holding in *Carbon Fuel Co.* v. *United Mine Workers,* 444 U.S. 212 (1979). Moreover, if such a holding were to become part of our substantive federal labor law, it would require the parties to the collective bargaining process to incorporate in their agreements a particular remedy for the breach of each particular undertaking.

4. Contrary to Respondents' contention, there is indeed a conflict within the Circuits that can be resolved by a decision in this case. The Court of Appeals in this case expressly disavowed the Third Circuit's decision in *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951 (1975), apparently even on the question of whether the courts will enforce an express "best efforts" undertaking on the part of a union.

5. It is therefore submitted that certiorari should be granted on each of the issues in this case. At a minimum, the writ should be granted on the question of individual liability which is now before this Court in *Complete Auto Transit.* Otherwise, Petitioner will have suffered damages from an admittedly unlawful strike while, at the same time, being denied any recovery for it. It is submitted that federal labor law contemplates no such result, and this Court should now so hold.

Respectfully submitted,

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